

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORY LEE DONALD,

Defendant-Appellant.

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UNPUBLISHED

April 10, 2008

No. 275688

Wayne Circuit Court

LC No. 06-003170-01

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RASHAD LEE MOORE,

Defendant-Appellant.

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No. 275691

Wayne Circuit Court

LC No. 05-012835-01

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendants Cory Lee Donald and Rashad Lee Moore were tried jointly, before separate juries. Both defendants were convicted of first-degree felony murder, MCL 750.316(1)(b), and two counts of armed robbery, MCL 750.529, and defendant Moore was also convicted of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during commission of a felony (second offense), MCL 750.227b. Defendant Donald was sentenced to life imprisonment for the murder conviction and 10-1/2 to 20 years' imprisonment for each armed robbery conviction. Defendant Moore was sentenced to life imprisonment for the murder conviction, 15 to 30 years' imprisonment for each armed robbery conviction, three to five years' imprisonment for the felon in possession and CCW convictions, and a consecutive five-year term of imprisonment for the felony-firearm

conviction.<sup>1</sup> Defendant Donald appeals as of right in Docket No. 275688, and defendant Moore appeals as of right in Docket No. 275691. We affirm.

## I. Docket No. 275688 (Defendant Donald)

### A. Absence of Counsel

Defendant Donald argues that he was denied his Sixth Amendment right to the effective assistance of counsel when his trial attorney was absent during a portion of the trial without defendant Donald's consent.

As our Supreme Court observed in *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007):

Most claims of ineffective assistance of counsel are analyzed under the test developed in *Strickland* [*v Washington*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 674 (1984).] Under this test, counsel is presumed effective, and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error. . . . But in [*United States v*] *Cronic* [466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)], the United States Supreme Court identified three rare situations in which the attorney's performance is so deficient that prejudice is presumed. One of these situations involves the complete denial of counsel, such as where the accused is denied counsel at a "critical stage" of the proceedings. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, the difference is not of degree but of kind. [Footnote and some citations omitted.]

The record discloses that before counsel's absence, the trial court and the defense attorneys for the other codefendants discussed, outside the juries' presence, a record of cell phone calls that were made to and from codefendant Moore, codefendant DeWayne Saine, and an alleged accomplice, Fawzi Zaya. Defendant Donald was not linked to any of the telephone calls and defendant Donald's trial attorney informed the court that he was not joining in an objection to the telephone records by the other codefendants, remarking "I don't have a dog in this race. It doesn't affect me at all." When the juries returned, defendant Donald's attorney was absent from the courtroom. Because the telephone record evidence did not concern defendant Donald, the trial court decided to proceed to take testimony concerning the records without waiting for defendant Donald's attorney to return, explaining "it doesn't apply to his client." The prosecutor thereafter admitted a chart of the cell phone records, and testimony was received concerning the cell phone records, the phone numbers, and the times of the calls listed on the chart. Shortly thereafter, defendant Donald's attorney returned. The trial court remarked that, during counsel's absence, "we only were discussing the telephone chart that was there."

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<sup>1</sup> The trial court subsequently vacated one of the armed robbery sentences for each defendant.

Defendant Donald's attorney responded, "Yes, your Honor, and as I indicated on the record, I had no dog in the race and no interest in that."

Defendant Donald now argues that he is entitled to a new trial without the necessity of showing actual prejudice because his attorney was absent during a critical stage of the trial and, therefore, prejudice must be presumed. We disagree.

A critical stage is one that holds "significant consequences for the accused." *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002). In this case, defendant Donald's attorney was absent for a brief portion of the trial during which evidence of telephone records was received. None of the telephone calls were linked to defendant Donald, however, and the telephone record evidence did not directly implicate defendant Donald in the charged crimes. Both before and after the evidence was introduced, defendant Donald's attorney remarked that the evidence did not concern defendant Donald. Under these circumstances, we cannot conclude that defense counsel was absent during a critical stage of the trial. See *Vines v United States*, 28 F3d 1123, 1125-1127 (CA 11, 1994) (declining to hold that counsel was absent during a critical stage of trial within the meaning of *Cronic* where no evidence directly inculcating the defendant was presented while that defendant's counsel was absent). Therefore, defendant Donald is not entitled to a presumption of prejudice arising from counsel's absence.

Instead, review of defendant Donald's ineffective assistance of counsel claim is governed by the test developed in *Strickland, supra*, which places the burden on defendant to establish that he was prejudiced by counsel's alleged deficient performance. Defendant Donald has not met that burden. Because defendant Donald was not linked to the series of telephone calls, and the telephone record evidence did not implicate defendant Donald in the charged crimes, there is no reasonable probability that the outcome of the trial would have been different had counsel been present during the initial portion of this testimony.

#### B. Defendant Donald's Standard 4 Brief.

Defendant Donald raises two issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, neither of which have merit.

Defendant Donald first argues that defense counsel was ineffective for failing to object to the prosecutor's conduct of vouching for the credibility of prosecution witness Siente Liggins. Because this issue was not raised in a motion for a new trial or request for a *Ginther*<sup>2</sup> hearing, our review is limited to mistakes apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Contrary to what defendant Donald argues, it was not improper for the prosecutor to elicit the terms of Liggins's plea agreement, which required him to provide truthful testimony against defendant. The prosecutor did not suggest that either she or the government had some special knowledge, unknown to the jury, that Liggins was testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Furthermore, the prosecutor properly could argue that the facts and evidence demonstrated that Liggins was worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Similarly, because the evidence showed that Liggins agreed to assist the police and there was evidence that the police made efforts to corroborate information they received from Liggins, the prosecutor properly could comment on that evidence in closing argument. *Bahoda, supra* at 282; *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).

Because there was no misconduct by the prosecutor, defense counsel was not ineffective for failing to object. Defense counsel is not required to make futile objections. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant Donald next argues that he was improperly convicted of first-degree felony murder because there was insufficient evidence of premeditation and deliberation.

In reviewing a defendant's challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Contrary to what defendant Donald argues, premeditation and deliberation is not required to convict a defendant of felony murder. Rather, defendant Donald was charged with felony murder under an aiding and abetting theory. In *People v Riley (After Remand)*, 468 Mich 135, 140-141; 659 NW2d 611 (2003), our Supreme Court explained:

To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, or to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony.

In order to satisfy the malice standard[,] . . . the prosecution must show that the aider and abettor either intended to kill, intended to cause great bodily harm, or wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. Further, if an aider and abettor participates in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor is acting with "wanton and willful disregard" sufficient to support a finding of malice.

In this case, there was evidence that defendant Donald and codefendant Moore, each armed with a gun, intended to rob Mohamed Mackie. Liggins testified that he saw both defendants enter the house. Michael McGinnis, who was one of the robbery victims, testified that at least two people came inside the house and took money from his pocket while holding a gun to his head. McGinnis heard two gunshots during the offense and later heard one of the intruders whisper that he had been shot. When the intruders left, McGinnis discovered that Mackie had also been shot. Liggins testified that both defendant Donald and codefendant Moore

had guns when they returned to his car. Defendant Donald was treated at a hospital for a gunshot wound later that night, and defendant Donald's blood was later discovered on the barrel of the weapon that was linked to the offense.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational jury to find beyond a reasonable doubt that, at a minimum, defendant Donald knowingly participated in the robbery and knowingly armed himself with a gun, which created a high risk of death or great bodily harm with knowledge that death or great bodily harm was a probable result of the intended crime. Thus, the evidence was sufficient to support defendant Donald's conviction of first-degree felony murder.

## II. Docket No. 275691 (Defendant Moore)

Defendant Moore argues that he was denied a fair trial, and that the trial court erred by denying his motion for a mistrial, after McGinnis referred to a polygraph examination.

A trial court's decision on a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). A mistrial should be granted only for an irregularity that is prejudicial to the defendant's rights, that cannot be cured, and that impairs the defendant's ability to receive a fair trial. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005).

On direct examination, the prosecutor asked McGinnis whether he ever saw his Razr cell phone after it was taken from him during the robbery. He responded, "Yes. The police showed me after we went down to the police station they had me take a polygraph to make sure my story was correct because I did lie to them the first time." Following a defense objection, the trial court instructed the jury:

Members of the jury, you know, that comment about the polygraph was not responsive to the prosecution. He mentioned it. Forget about that, and polygraph evidence usually as a rule is not allowed before the jury, so just forget about that comment, that testimony.

Later, McGinnis was asked on cross-examination whether he told something to Sergeant Meiers. He replied, "If Sergeant Meiers is the one who gave me the polygraph." Defense counsel immediately interrupted and redirected the question. There was no objection or request for a curative instruction to this later response. Defendant Moore later moved for a mistrial based on McGinnis's references to a polygraph, which the trial court denied.

The following factors should be considered when deciding whether a trial court abused its discretion in failing to grant a mistrial when a witness has mentioned a polygraph:

(1) [W]hether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*People v Yatooma*, 85 Mich App 236, 240; 271 NW2d 184 (1978).]

See also *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

Only McGinnis's first reference to a polygraph was met with an immediate objection and the trial court immediately gave a curative instruction. It is apparent, however, that both references were volunteered, and neither was injected in the context of attempting to bolster McGinnis's credibility. The first reference was offered as a frame of reference—to refer to the occasion when the police showed McGinnis his Razr phone, and the second reference occurred in the context of attempting to clarify the identity of a particular police officer. In neither instance were the results of any test revealed. Furthermore, McGinnis's credibility was not particularly crucial to a determination of defendant Moore's guilt or innocence. Although McGinnis was a robbery victim, he was not an eyewitness to the shooting of Mackie and he was not able to identify the perpetrators. Defendant Moore's identity as a perpetrator in the offense was instead established by independent evidence. Under the circumstances, the trial court did not abuse its discretion in denying defendant Moore's motion for a mistrial.

We also reject defendant Moore's claim that the trial court's cautionary instruction was inadequate and misleading. Because defendant Moore did not object to the court's instruction, his claim of instructional error is unpreserved and we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Contrary to what defendant Moore argues, the trial court's instruction did not leave the jury with the impression that McGinnis had passed a polygraph. As previously indicated, the results of any polygraph examination were never revealed and there was nothing about the court's instruction that suggested any results. Further, the trial court's instruction was not calculated to leave the jury with the impression that it could still consider any polygraph evidence. On the contrary, the court directed the jury to "[f]orget about that, . . . so just forget about that comment, that testimony." Although defendant Moore argues that the trial court should have additionally explained to the jury that polygraph tests are unreliable, the need for such an explanation was curtailed by the fact that the results of any test were never disclosed, and by the court's instruction to forget about the comment altogether. The jury is presumed to have followed the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). For these reasons, defendant Moore has not established a plain instructional error.

Defendant Moore also argues that the trial court improperly prevented defense counsel from impeaching McGinnis with a 2003 conviction for breaking and entering and with his denial of a criminal record at the preliminary examination. A trial court's determination whether a prior conviction may be used for impeachment is reviewed for an abuse of discretion. *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005).

MRE 609 provides:

(a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

“Theft crimes are minimally probative on the issue of credibility, and, therefore, they are admissible only if the probative value of the evidence outweighs the prejudicial effect.” *Meshell, supra* at 635. When exercising its discretion, the trial court “must articulate, on the record, the analysis of each factor.” MRE 609(b).

Although the trial court did not analyze each of the applicable factors on the record, reversal is not required on this basis if the court was aware of the pertinent factors and of its discretion. *Meshell, supra* at 638. Here, the trial court specifically referred to MRE 609 and its discretion under that rule. It determined that the prior conviction did not have significant probative value of the issue of McGinnis’s credibility, considering that McGinnis had already admitted previously lying to the police, and that the jury was already aware that McGinnis had a prior criminal record and history of involvement with drugs. Under the circumstances, the trial court did not abuse its discretion.

Furthermore, even if the trial court did err by precluding the additional impeachment evidence, the error was harmless. A preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant Moore’s defense theory, that the robbery and shooting were committed by defendant Donald and Liggins, did not hinge on McGinnis’s credibility. Rather, McGinnis was unable to identify the perpetrators. Instead, Liggins testified at trial that he was present when defendant Moore and Fawzi Zaya discussed committing the robbery earlier in the day, that he drove defendants Moore and Donald to Mackie’s house, and that defendants Moore and Donald both went inside the house while he waited in the car. After the offense, the police spotted Liggins’s vehicle and pursued it until it stopped at the end of a dead-end street. Defendant Moore, a passenger in the vehicle, was arrested. The police found evidence linked to the robbery inside Liggins’s vehicle, and also found keys to a vehicle in Mackie’s driveway and keys to Mackie’s house in defendant Moore’s possession. Under the circumstances, the case did not hinge on McGinnis’s credibility, and it is not more probable than not that any error in excluding the additional impeachment evidence of McGinnis was outcome determinative.

Finally, defendant Moore argues that the trial court’s critical comments of defense counsel pierced the veil of judicial impartiality, depriving him of a fair trial. Because defendant Moore did not object to the trial court’s comments, this issue is unpreserved and our review is limited to plain error affecting defendant’s substantial rights. *Carines, supra* at 763.

The trial court has a duty to control the proceedings at trial, and to “exercise reasonable control over the mode and order of interrogating witnesses” for a variety of reasons, including

avoidance of “needless waste of time” and the protection of witnesses from harassment. MRE 611; MCL 768.29. However, the court must exercise caution and restraint to ensure that its comments are not prejudicial or partial. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). “The test is whether the ‘judge’s questions and comments ‘may well have unjustifiably aroused suspicion in the mind of the jury as to a witness’ credibility, . . . and whether partiality “quite possibly could have influenced the jury to the detriment of the defendant’s case.” ’ ” *Id.*, quoting *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986), quoting *People v Redfern*, 71 Mich App 452, 457; 248 NW2d 582 (1976).

Defendant Moore complains about a single instance in which a witness expressed confusion by one of defense counsel’s questions and the trial court directed counsel to make his questions more specific. Although the trial court’s comments may reflect some impatience with defense counsel, they did not pierce the veil of judicial impartiality. Further, considering the limited and isolated nature of the court’s remarks, any perceived prejudice was alleviated by the trial court’s later instructions to the jury that its comments, rulings, questions, and instructions were not evidence, and were not intended to influence the jury or express the judge’s personal opinion.

Finally, having rejected defendant Moore’s individual claims of error, reversal under a cumulative error theory is not warranted. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

Affirmed.

/s/ Christopher M. Murray  
/s/ David H. Sawyer  
/s/ Mark J. Cavanagh